REMARKS

Objection to Specification

The objection to the specification for not properly citing application priority data has been obviated by amendment. Accordingly, withdrawal of this ground of objection is respectfully requested.

Claim Rejections – 35 U.S.C. § 102/103

The rejection of claims 6-13 under 35 U.S.C. § 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as being obvious over *Bezruchko et al.* (SU 1306947 A) is respectfully traversed.

Independent claim 6 recites "preparing a second assay sample by staining all bacteria in a second specimen part using a second fluorescent dye and a surface-active agent" (emphasis added). At a minimum, *Bezruchko et al.* fails to teach or suggest a "surface-active agent" in the sense of the claimed invention.

As explained in the specification, the "first assay sample" recited in independent claim 6 provides a classification and count of dead bacteria (e.g., page 13, lines 3-27; etc.) while the "second assay sample" provides a classification and count of all bacteria (e.g., page 20, lines 15-25 of specification). Thus, a more accurate count of live bacteria can be calculated by subtracting the dead bacteria count obtained from the first assay sample from the total bacteria count obtained from the second assay sample (e.g., page 20, line 26 to page 21, line 4). The "surface active agent" recited in independent claim 6 plays an important role in this process. Specifically, the surface-active agent damages the cell membrane (cell wall) of the bacteria, such that the fluorescent dye can effectively enter into the bacteria, and thus generally stain the bacteria (e.g., page 15, lines 18-34; etc.).

Bezruchko et al. describes the measurement of microorganisms in deionised water but is completely silent with respect to any "surface-active agent" in the sense of the claimed invention. Moreover, *Bezruchko et al.* contains no teaching or suggestion that a surface-active agent damages the cell membrane (cell wall) of bacteria, such that fluorescent dye can effectively enter into the bacteria. Thus, for at least this reason, Applicants respectfully submit that the claimed invention is neither anticipated by nor would have been obvious in view of *Bezruchko et al.*

Notwithstanding the above, Applicants respectfully submit that one of ordinary skill in the art would not have been motivated to modify the teachings of *Bezruchko et al.* in an attempt to arrive at the claimed method for counting bacteria inasmuch as these teachings are directed to a wholly unrelated technical field—namely, the electronics industry (e.g., abstract, line 1). Applicants note that the only type of sample described in *Bezruchko et al.*—deionised water—is substantially different from the more complex "clinical specimens" that are analyzed by the claimed invention. With regard to the claimed invention, the hypothetical person of ordinary skill would likely be a doctor, medical technician, laboratory analyst or the like skilled in the field of laboratory diagnostics. Such a person would not be expected to be aware of any teaching related to the particular needs of the electronics industry and would not have sought out or considered any teaching on deionized water—much less have been motivated to modify such teachings—in an effort to arrive at a method for counting bacteria in a clinical specimen.

In short, for all of the reasons set forth above, Applicants respectfully submit that the claimed invention is neither anticipated by nor would have been obvious in view of *Bezruchko et al.* Accordingly, withdrawal of this ground of rejection is respectfully requested.

Double Patenting

The rejection of claims 6-13 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 21-25 of co-pending U.S. Patent Application Serial No. 10/922,522 is respectfully traversed.

Claims 21-25 of U.S. Patent Application No. 10/922,522 relate to methods for detecting non-fermentative and fermentative bacteria but provide no teaching or suggestion of classifying and counting live and/or dead bacteria, as in the claimed invention. Moreover, claims 21-25 contain no teaching or suggestion whatsoever of a "surface-active agent," as required by independent claim 6.

For at least these reasons, Applicants respectfully submit that the claimed invention would not have been obvious in view of claims 21-25 of co-pending U.S. Patent Application Serial No. 10/922,522. Accordingly, withdrawal of this ground of rejection is respectfully requested.

Conclusion

In view of the Remarks set forth above, Applicants respectfully submit that the claimed invention is in condition for allowance. Early notification to such effect is earnestly solicited.

If for any reason the Examiner feels that the above Remarks do not put the claims in condition to be allowed, and that a discussion would be helpful to advance prosecution, it is respectfully requested that the Examiner contact the undersigned agent directly at (312)-321-4257.

Respectfully submitted,

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